SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 810

MR. AND MRS. J. H. ANDERSON,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I.

Opinions of the Courts Below.

The opinion in the District Court (R. 13-15) was rendered on December 6, 1940, and is not officially reported.

The opinion of the Circuit Court of Appeals (R. 22-27) was rendered on December 2, 1942, and is reported in 132 F. (2d) 98.

II.

Jurisdiction.

1. The date of the decree of the Circuit Court of Appeals for the Sixth Circuit to be reviewed is December 2, 1942 (R. 21). A petition to rehear, seasonably filed, was

denied on February 2, 1943, on which date the decree became final (R. 41). This petition, together with a certified transcript of the record, is filed within three months after said decree became final.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Sec. 347.

III.

Statement of the Case.

This has already been stated in the preceding petition, I (pps. 1-4), which is hereby adopted and made a part of this brief.

IV.

Specification of Error.

1. The Circuit Court of Appeals erred in reversing the District Court and holding that the question as to whether or not the grantor of a trust remains the owner of the corpus and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934 is a question of law, or a mixed question of law and fact on which a Court of Appeals can make a new finding.

2. The Circuit Court of Appeals erred in reversing the District Court and holding that income of a term trust devoted to religious purposes, giving only non-material satisfaction to the grantor, is substantially equivalent to income from such a trust devoted to family purposes and thereby taxable to the grantor under the standards set in the cases of *Helvering* vs. *Horst,* 311 U. S. 112 and *Helvering* vs. *Clifford,* 309 U. S. 331.

3. The Circuit Court of Appeals erred in reversing the District Court and holding that the grantor of a trust

remained the owner of the corpus of the trust and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934, as a conclusion of law or a mixed question of law and fact, where the facts as stipulated and found by the District Judge and not set aside by the Appellate Court, were:

(a) That the trust was irrevocable and created for a term beginning July 21, 1931 and ending January 1, 1937.

(b) That the title to and possession of the corpus was transferred and delivered to the trustee and the trustee managed the trust estate.

(c) That the income of the trust was paid, pursuant to its terms, to a religious association for religious purposes and no part thereof was subject to any control of, or direction by, the grantor, and the grantor received no economic gain therefrom—but only non-material satisfaction.

(d) That no controls over the corpus reserved by the settlor were, in fact, exercised or reserved for any purpose other than the protection of the beneficiary and consisted only of (1) the power to veto changes in and reinvestments of the corpus; (2) the power to demand proxies to vote stocks, and (3) the power to substitute trustees, but any substitute trustee to be bound by the terms of the trust indenture.

V.

Summary of the Argument.

A. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein holding that income from a trust, which, pursuant to the terms of the trust, is devoted to a religious cause, giving non-material satisfaction to the grantor is the equivalent

of income from a trust devoted to family purposes and the decisions of this Court in the case of Helvering vs. Stuart, supra.

1. The Circuit Court of Appeals holds herein:

   "To make financial sacrifice to piety, or to establish a strong and dominent religion, often brings a satisfaction of one's desires greater than that gained from similar sacrifices for blood kin. In our opinion, under the standard set in the Clifford and Horst cases, the income of the so-called present trust was taxable to the appellee" (R. 27).

2. The trust indenture involved provides for the payment of the income of the trust to a religious association (R. 9, Ex. 2, R. 42).

3. The income was paid to the association as provided (R. 9, Item 6).

4. The grantor of the trust received only non-material satisfaction (R. 9, Item 7).

5. Economic gain realized or realizable is necessary to produce a taxable income.

   Helvering vs. Stuart, supra.

6. Non-material satisfaction arising from the use of the income of a trust for religious purposes is not a taxable substitute for economic gain arising from the use of such income for family purposes under the standard of the *Horst (Helvering vs. Horst,* 311 U. S. 112) and *Clifford (Helvering vs. Clifford,* 309 U. S. 331) cases.

   Helvering vs. Stuart, 63 S. Ct. 140.

7. The decision of the Circuit Court of Appeals herein holding non-material satisfaction derived from a use of income for religious purposes to be the equivalent of economic gain derived from a family use of income is in direct conflict with the authoritative decision of this Court.

   Helvering vs. Stuart, supra.

B. The writ should be granted because of the conflict between the decision of the Court of Appeals herein holding that a finding under the facts by the District Judge that income of a trust is not income of the grantor thereof, within the meaning of Sec. 22(a) of the Revenue Act of 1934, supported by substantial evidence, is subject to review as a mixed question of law and fact by a Court of Appeals and not for errors of law only and the decisions of this Court in the case of Helvering v. Clifford, supra, Hormel v. Helvering, supra, and Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner v. Williamson, supra.

1. The District Judge found as a fact that the grantor of the trust was not the owner of the corpus of the trust and not taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934 (R. 14).

2. The question is one of fact for determination by the trier of the facts in accordance with applicable principles of law.

Helvering vs. Clifford, supra;
Helvering vs. Stuart, supra;
Commissioner vs. Goulder, 123 F(2d) 686;
Commissioner vs. Williamson, supra.

3. The District Judge having considered the factual relationship between the grantor of the trust and the use of the income and the purpose and effect of the controls reserved by the grantor over the corpus, and his determination being supported by substantial evidence, this finding can be reviewed on appeal only for errors of law.

Helvering vs. Stuart, supra;
Hormel vs. Helvering, supra;
Commissioner vs. Williamson, supra.

4. The decision of the Circuit Court of Appeals herein holding the question involved to be one of law or mixed law and fact and drawing a new conclusion as a matter of law without reference to the facts as found is contrary to the applicable decisions of this Court.

Helvering vs. Clifford, supra;
Hormel vs. Helvering, supra;
Helvering vs. Richter, 312 U. S. 561;
Helvering vs. Stuart, supra.

5. The decision of the Circuit Court of Appeals herein is directly contrary to that of the *Seventh Circuit* Court in the recent case of *Commissioner vs. Williamson, supra.*

C. The writ should be granted because of the conflict between the decisions of the Circuit Court of Appeals herein reversing the District Court and holding as a matter of law or a mixed question of law and fact that the reservation of insubstantial powers by the grantor of an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937, in fact, not exercised or reserved for any purpose or use other than the protection of the beneficiary, where the income from the trust was paid pursuant to the terms of the trust agreement to the beneficiary thereof for religious purposes, and the grantor, neither directly nor indirectly, received any economic gain, was nevertheless income of the grantor under Sec. 22(a) of the Revenue Act of 1934, and the decisions of this Court in the cases of Helvering v. Clifford, supra; Hormel v. Helvering, supra; Helvering v. Stuart, supra; and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Chamberlain, 121 F(2d) 765.

1. The question as to whether or not income of a trust is taxable to the grantor thereof under Sec. 22(a)

of the Revenue Act of 1934 is at least primarily a question of fact.

Helvering vs. Clifford, 309 U. S. 331;
Helvering vs. Stuart, 63 S. Ct. 140.

2. A finding of a trial court will not be set aside unless clearly erroneous.

Federal Rules of Civil Procedure, Rule 52(a).

3. Reservations of power by the grantor of a trust not in fact used or reserved by the grantor for some purpose other than the protection of the beneficiary, cannot give the grantor complete control of the corpus as a matter of fact.

4. Reservations of power by the grantor of a trust do not, as a matter of law, give the grantor control of the corpus unless they are so extensive that it must be said that the taxpayer is the owner.

Helvering vs. Clifford, supra;
Helvering vs. Stuart, supra;
Reinecke vs. Northern Trust Co., 278 U. S. 339;
Commissioner vs. Branch, 114 F. (2d) 985.

5. Ownership gives the right to income; the right to sell, pledge, give away or otherwise dispose of the corpus; to invest the corpus as owner sees fit; to manage the property and pay the income to whomsoever he will.

6. The negative powers reserved by the grantor herein to veto (not direct) investments; to vote (not sell—pledge—exchange—etc.) stocks; to substitute trustees (not manage, collect and distribute income and mingle the assets of the trust with his own), fall far short of ownership as a matter of law.

7. The use of income for a religious purpose, pursuant to the terms of the trust indenture giving the

grantor non-material satisfaction, is not a taxable substitute for economic gain.

8. Nor is a trust completely controlled as a matter of law merely because its term is approximately five and a half years.

Helvering v. *Wood*, 309 U. S. 344;
Commissioner v. *Chamberlain*, 121 F. (2d) 765.

9. The holding of the Circuit Court of Appeals in this case is apparently in conflict with the authoritative decisions of this Court.

10. The holding of the Circuit Court of Appeals in this case is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner* v. *Chamberlain*, 121 F. (2d) 765.

11. The holding of the Circuit Court of Appeals in this case is the first holding the income of a charitable trust taxable to the grantor, and is contrary to other decisions on varying facts. The conflict should be resolved by this Court.

Argument.

A. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein holding that income from a trust, which, pursuant to the terms of the trust, is devoted to a religious cause, giving non-material satisfaction to the grantor is the equivalent of income from a trust devoted to family purposes and the decision of this Court in the case of Helvering v. Stuart, supra.

The petitioner in the instant case, neither directly nor indirectly, received any economic gain from the income of the trust established by him (R. 9, Item 7).

It was the insistence of the respondent in the Court below:

> "That the Clifford decision, when considered in the light of the clear implications of the Horst case, determines the issues here; and that the satisfaction which the taxpayer purchased by his transfer should be considered a taxable substitute for, and measured by, the income which he relinquished."

The Court of Appeals, in response to this insistence and in the concluding paragraph of its opinion, after quoting the "non-material satisfaction" paragraph of the opinion in the case of *Helvering* v. *Horst, supra,* holds:

> "To make financial sacrifice to piety or to establish a strong and dominant religion, often brings a satisfaction of one's desires greater than that gained from similar sacrifice for blood kin. In our opinion, under the standard set in the *Clifford* and *Horst* cases, the income of the so-called present trust was taxable to the appellee" (R. 27).

This opinion of the Court of Appeals was released shortly after the opinion of this Court in the case of *Helvering* v. *Stuart, supra,* wherein the statement in the *Horst* case was limited to its facts, and this Court held that "economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme".

The conclusion of the Court of Appeals in this case, being directly in conflict with the authoritative decision of this Court, it is respectfully submitted that the writ should issue.

B. The writ should be granted because of the conflict between the decision of the Court of Appeals herein holding that a finding under the facts by the District Judge that income of a trust is not income of the grantor thereof, within the meaning of Sec. 22(a) of the Revenue Act of 1934, supported by substantial evidence, is subject to review as a mixed question of law and fact by a Court of Appeals and not for errors of law only and the decisions of this Court in the cases of Helvering v. Clifford, supra, Hormel v. Helvering, supra, and Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner v. Williamson, supra.

The stipulation filed in this case provides "The statements contained in this stipulation are true" (R. 8). With the stipulation as a finding of fact, the District Judge, as the trier of facts, found:

> "The reservations in the settlor fall short of an effective retention of ownership * * *."
>
> "* * * the settlor was not himself the trustee, and although he reserved the right to change the trustee during the life of the trust, he never exercised the right, and according to the stipulation the trustee was sole administrator of the property trusteed and none of the controls reserved in the settlor was exercised * * *."
>
> "* * * since the sole income from the corpus estate, as a matter of actuality, was paid to the cestui que trust, no legal duty resting upon the settlor to contribute any amount to the cestui que trust, and no part of the income or corpus during the life of the trust being diverted to any direct or indirect legal responsibility of the settlor * * * the contention of the plaintiff is supported by the facts" (R. 14-15).

The question as to whether or not income is taxable to the grantor of a trust under Section 22 (a) of the Revenue

Act of 1934 is a question of fact to be determined by the triers of the facts in accordance with the applicable principles of law.

Helvering v. *Clifford, supra;*
Hormel v. *Helvering, supra;*
Helvering v. *Stuart, supra;*
Helvering v. *Richter,* 312 U. S. 561;
Helvering v. *Rankin,* 295 U. S. 123.

The form is to be disregarded and the actuality observed.

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra.*

In looking through the form to the actuality this Court has directed the trier of facts:

(a) *To consider the use of the income*—Does it pay an obligation of the grantor, remain within the family as an economic unit or as a matter of fact, in some other way result in economic gain to the grantor—Does the grantor continue to control the disposition of the income?

Helvering v. *Clifford, supra.*

The District Judge in this case considered these questions and found, as a matter of fact, supported by the stipulation of the parties, that the income of the trust, pursuant to the directions of the trust agreement, was paid by the trustee to the beneficiary, an exempt religious association (R. 9, Item 6); that no part of the income went to the grantor or any member of his family or was used to discharge any legal obligation of the settlor or his family (R. 9, Item 7).

(b) *To consider the purpose and effect of powers reserved by the grantor.*

Helvering v. *Stuart, supra;*
Helvering v. *Clifford, supra.*

The District Court in this case considered these powers and found that the powers were not, in fact, exercised (R. 15); that the trustee was the sole administrator of the property (R. 15); that the stocks held by the trustee, constituting a little more than half the corpus of the trust (R. 9, Item 5, Ex. 2, R. 42) had belonged to the grantor's deceased wife and the grantor had coincidentally with his receipt of the stocks, created the trust (R. 8, Items 2, 3). No ulterior motive in the retention of voting rights is suggested and the Court found none. In connection with the power to veto changes in and reinvestments of securities amounting to approximately one-half of the corpus of the trust, the Court found no notes or securities executed by the grantor (R. 9, Ex. 3, R. 45), but a sound selection of municipal, county and United States bonds and mortgages. No ulterior motive in the retention of this power was suggested and the Court found none. In connection with the power to change the trustee, the Court found that a national bank had been chosen and not changed (R. 14). The Court judicially knew that many banks were failing in 1931 when this trust was created and this furnished a logical and true reason for the reservation of this power. No ulterior motive in the retention of this power was suggested and the Court found none.

The Court holds as a matter of fact:

> "* * * the reservations in the settlor fall short of an effective retention of ownership" (R. 14).

The Court of Appeals, in its decision of this case, gives no weight or consideration to this finding of fact by the trier of the facts, and, without finding the factual determination of the District Court clearly erroneous or lacking the support of substantial evidence, concludes that the income of this trust was taxable to petitioner as grantor.

If taxation is a matter of actuality, and not fine spun legal theories when the Court looks through the form of the trust, and the tax is imposed, fine spun legal theories should not overcome actuality as a matter of defense when the Court looks through the form of the facts. Actuality is factual in its concept.

The decision of the Court of Appeals herein is in conflict with the authoritative decisions of this Court.

The decision is also in direct conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit on the same matter.

In the case of *Commissioner* v. *Williamson, supra,* the United States Circuit Court of Appeals for the Seventh Circuit holds, after reviewing the case of *Helvering* v. *Stuart, supra,* as follows:

> "If we are correct in this analysis of the Court's opinion, it follows that the appraisement must be made by the Board and its determination accepted unless we can say as a matter of law that it is erroneous." (ibid —.)

The same provision as Sec. 22(a) of the Revenue Act of 1934 is contained in all subsequent Revenue Acts.

Numerous cases have arisen under this section with conflicting views as to the effect of a finding of fact on the extent of a review in the appellate courts.

The view of the Seventh Circuit is supported by an earlier case from the Sixth Circuit, wherein the Court says:

> "Ordinarily the question of whether the facts in the case at bar being undisputed would bring the income arising to the trust within Sec. 22(a) to settlor is one of law, but the decision in the Clifford case seems to hold that whether or not such facts have the legal effect of proving ownership of income is one of fact * * *.

> We lack the power to decide the facts upon appeal no matter how clearly the record may disclose them."
>
> *Commissioner vs. Goulder,* 123 F. (2d) 686 (ibid p. 689).

The view of the Seventh Circuit is opposed by the majority opinion of the Third Circuit in the case of *Commissioner* v. *Brown,* 122 F. (2d) 800, but the dissenting opinion (Judge Maris) in the case states:

> "Furthermore, I think that the Supreme Court in the Clifford case indicated that the question whether a donor had retained such control over and benefits under a trust fund as to render its income his within the definition of Sec. 22(a), was a question of fact to be found by the triers of fact. It would follow under settled principles that the finding of the Board of Tax Appeals upon this question should not be reversed by us if supported by substantial evidence. (ibid p. 804.)

It seems to counsel for petitioners that the holding of the Court of Appeals in the *Williamson* case, the *Goulder* case, *and the dissenting opinion in the Brown* case, correctly interpret and are in accord with the holdings of this Court in the *Clifford, Hormel* and *Stuart* cases. If this is correct, then the holding in the instant case is clearly contrary to the authoritative decisions of this Court. If this is incorrect, and this Court has not finally determined this question, the conflict between the decisions of the Court of Appeals should be settled by this Court, and in either event, the writ should be granted in order to correct the action of the Court below or to settle the conflict involved.

C. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein reversing the District Court and holding as a matter of law or a mixed question of law and fact that the reservation of insubstantial powers by the grantor of an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937, not exercised or reserved for any purpose or use other than the protection of the beneficiary, where the income from the trust was paid pursuant to the terms of the trust agreement to the beneficiary thereof for religious purposes, and the grantor, neither directly nor indirectly, received any economic gain, was nevertheless the income of the grantor under Sec. 22(a) of the Revenue Act of 1934, and the decisions of this Court in the cases of Helvering v. Clifford, supra; Hormel v. Helvering, supra; Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision by the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Chamberlain, 121 F.(2d), 765.

The petitioner in the instant case did not exercise any power reserved to him as grantor in the trust agreement. The trust was administered by a national bank as trustee. He received no economic gain from the income of the trust. The trust was an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937. These facts were stipulated and found by the District Judge, as the trier of facts (R. 14).

The Court of Appeals holds that as a matter of law the unexercised powers reserved consisting of: (1) The right to veto changes in and proposed reinvestments of the corpus of the trust; (2) The right to vote stocks held as a part of the corpus of the trust; and (3) The right to substitute another trustee bound by the terms of the trust agreement

for the named trustee *plus the use of the income for a purpose giving non-material satisfaction to the grantor;* caused the grantor of the trust to be the owner of the corpus of the trust and the income taxable to him under Sec. 22(a) of the Revenue Act of 1934.

The question as to whether or not income is taxable to the grantor of a trust under Sec. 22(a) of the Revenue Act of 1934 is a question of fact to be determined by the "triers of facts", in accordance with the applicable principles of law.

Helvering v. *Clifford, supra;*
Hormel v. *Helvering, supra;*
Helvering v. *Rankin,* 295 U. S. 123;
Helvering v. *Stuart, supra;*
Commissioner v. *Williamson, supra.*

And this question cannot be considered initially in the appellate courts.

Helvering v. *Stuart, supra;*
Helvering v. *Richter,* 312 U. S. 561;
Hormel v. *Helvering, supra;*
Commissioner v. *Williamson, supra.*

Reservations of powers by the grantor of a trust, which, as a matter of law, fall short of complete control, cannot, as a matter of law, give the grantor thereof control of a trust so complete that it must be said the taxpayer is the owner;

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra;*
Reinecke v. *Northern Trust Co.,* 278 U. S. 339.

nor is a trust completely controlled merely because it is a trust for a term of five and one-half years.

Helvering v. *Wood,* 309 U. S. 344;
Achelis v. *Helvering,* 112 F. (2d) 92º;
Commissioner v. *Chamberlain,* 121 F. (2d) 765;

and where the taxpayer receives no economic gain—realized or realizable from the income of the trust, non-material satisfaction cannot be substituted therefor so as to make the grantor the owner of the corpus within the meaning of Sec. 22 (a) of the Revenue Act of 1934.

Helvering v. *Stuart, supra.*

Economic gain, realized or realizable by the grantor of a trust, is necessary before income is taxable to the grantor under Sec. 22 (a) of the Revenue Act of 1934.

Helvering v. *Stuart, supra.*

And while economic gain may be obtained through control of a trust so complete that it must be said the taxpayer is the owner;

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra;*

the mere retention of powers not, in fact, exercised (R. 15) or reserved for any purpose or use other than the protection of the beneficiary (R. 9, Item 4, Ex. 2, R. 42) is not control in fact; and the sole reserved powers being:

> (a) To veto changes in and reinvestments of corpus, a negative power, the grantor having no right to direct changes or reinvestments, and the trust instrument not waiving the statutory restrictions [1] on investments by trustees, this power is but a limited control similar to that exercised by the Senate in approving or rejecting nominations of the President. For this power to amount to a complete control of the trust some factual use or abuse must appear. It cannot, as a matter of law, be control.

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[1] Code of Tennessee, Sec. 9596.1—

"All trustees, guardians and other fiduciaries in this state, unless prohibited, or another mode of investment is prescribed, by the will or deed of the testator or other person establishing the trust, may invest all funds in their hands in the following securities:"

(b) To vote stocks; while approximately one-half of the corpus of the trust consists of stocks, yet, the right to vote, if limited to the purpose of protecting the beneficiary of the trust, does not, in law, give the individual exercising the right complete control over the trust or any economic benefit therefrom. There must be a further purpose such as the control of a corporation at stake in the voting rights so exercised—but whether or not such a purpose exists apart from the formal terms of the instrument, is a *question of fact.* The limited right to vote stocks for the protection of the beneficiary cannot, as a matter of law, be control.

(c) To substitute trustees—but any successor to be bound by the terms of the trust. Here again, solely as a matter of law, this power does not give the grantor complete control of the trust. It must be administered in accordance with the terms of the trust agreement, whoever may be the trustee. The trustee is also subject to control by the courts at the instance of the beneficiary.[2] For this power to amount to a complete control of the trust there must be some factual situation giving rise to actual control or economic benefit. The limited powers alone cannot, as a matter of law, be control.

Commissioner v. *Branch,* 114 F. (2d) 985.

In the case of *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, the Court considering the question of the effect of reserved powers as a matter of law on the ownership of the corpus of a trust, describes the reserved powers:

"The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustees to execute proxies to his nominee to vote any shares of stock held by the trustees and to appoint successor trustees" (ibid 344);

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[2] Code of Tennessee, Sec. 9573—

"The chancery, circuit, probate, and county courts have concurrent jurisdiction to accept the resignation of trustees or to remove and appoint trustees under the provisions of this chapter."

and as to their legal effect, says:

> "Nor did the reserved powers of management of the trust save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been complete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made" (ibid 346).

The mere reservation of these powers does not, therefore, as a matter of law, give to the grantor control over the economic benefits or enjoyment of the property.

The decision of the Circuit Court of Appeals herein is apparently in conflict with the authoritative decisions of this Court as to this matter.

The decision is also in conflict with the decision of the Circuit Court of Appeals for the *Second Circuit* on the same matter in the case of *Commissioner* v. *Chamberlain, supra.*

In the *Chamberlain case,* the grantor was one of two trustees, and as trustees they were expressly excused from investments of the character permitted by law; they were given broad powers in the management of the trust as to voting stocks, paying assessments, etc.; they were not required to give bond and the survivor, in case of death, or the remaining trustee, in case of resignation, without limitation, could name a successor trustee, or act alone. The trust was for a term of four years. The income was to be paid to the trustees of Columbia University for the purposes set out in the trust agreement.

The Commissioner insisted that the income was taxable to the grantor under the "non-material satisfaction" paragraph of the Horst case, or as assigned income under the

theory of that case and the case of *Helvering* v. *Eubank*, 311 U. S. 122.

The Court declined to follow the Commissioner's theory, and held that the grantor realized no economic gain from the income and that broad powers of management were insufficient to make the income taxable to the grantor.

In the brief of respondent in this case in the Circuit Court of Appeals, respondent admitted the conflict between the position taken by respondent in the court (as sustained by that Court) and the decision of the Circuit Court of Appeals for the Second Circuit, but insisted that the Second Circuit had failed to give full effect to the *Clifford case*.

The decision in this case by the Circuit Court of Appeals for the Sixth Circuit is the first holding by any Court, so far as petitioner is able to ascertain, taxing to the grantor of a trust actually created and extending beyond one year, income of a trust devoted to charitable purposes, where the grantor reserved no right to direct the use of the income. The right has been denied under varying circumstances in many cases, including:

Acheles v. *Helvering*, 112 F. (2d) 929;
Helvering v. *Bok*, Circuit Court of Appeals, Third Circuit, decided December 9, 1942, not officially reported;
Pierce v. *U. S.* (D. C. Minnesota), decided March 11, 1942, not officially reported.

The same provision as Sec. 22 (a) of the Revenue Act of 1934 is contained in all subsequent Revenue Acts. Undoubtedly, numerous term trusts for charitable purposes are created. It is respectfully submitted that this conflict of opinions of the Circuit Courts of Appeal should be resolved in the public interest.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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Counsel for Petitioners.

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